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No. 04-1021

In the Supreme Court of the United States

MICHIGAN HIGH SCHOOL ATHLETIC ASSOCIATION, INC.,
PETITIONER,

v.

COMMUNITIES FOR EQUITY, ET AL.,
RESPONDENTS.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

REPLY BRIEF OF PETITIONER

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I. DIFFERENCES IN THE IMPLEMENTATION OF CONSTITUTIONALLY AUTHORIZED SINGLE-SEX PROGRAMS ARE NOT PRESUMPTIVELY UNCONSTITUTIONAL

1. Respondents completely fail to address the central point made by petitioners, *amici*, and the Third, Fourth, Eighth, and D.C. Circuit decisions cited in the petition: that day-to-day decisions implementing the details of single-sex programs do not themselves classify anyone by gender.

The original choice to have separate teams by gender is a facial classification, and is unquestionably subject to heightened scrutiny. Respondents have never challenged that initial classification, and they concede it is both legal and good policy. Opp. 14 n.6. Once the division is made and teams are separated by gender, the choice of when to schedule the teams to play does not classify anyone by gender at all, but rather as members of individual teams. Respondents argue that "MHSAA's scheduling decisions explicitly and on their face divide athletes into two groups—one exclusively female and the other exclusively male." Opp. 15-16 n.7. But that is plainly wrong: the scheduling decisions do not divide athletes into male and female groups. The division of teams by gender happened thirty years ago and is acknowledged to be legal. The only way to turn a decision scheduling a particular athletic contest into a *facial* gender classification is to conflate it with the initial choice—made decades ago—to have separate teams.

Respondents repeatedly commit that error because it allows them to evade their burden of proof on the central issue in this case: petitioner's intent. It is settled law that the Equal Protection Clause is violated only by intentional discrimination—disadvantages imposed *because of*, not merely *in spite of*, race or gender. Laws that facially divide persons by race or gender trigger heightened scrutiny because "certain classifications . . . in themselves supply a reason to infer antipathy." *Personnel Adm'r v. Feeney*, 442

U.S. 256, 272 (1979). Courts use heightened scrutiny to "'smoke out' illegitimate uses" of race or gender and to ensure that classifications are not the product of prejudice or stereotype. *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989) (plurality opinion). But in order to justify that presumption of discriminatory purpose there must be something on the face of a policy or statute demonstrating that the policy or statute *itself* is classifying by race or gender. A statute or policy that does not facially classify anyone by race or gender gives no reason to assume *ab initio* that the action is motivated by discriminatory intent.

This Court discussed a very similar issue in *Shaw v. Reno*, 509 U.S. 630 (1993), where it explained that a districting statute "typically does not classify persons at all; it classifies tracts of land, or addresses." *Id.* at 646. Lines on a map, like dates on a calendar, are facially neutral. Of course a plaintiff is free to prove that the particular line, or date, was chosen *because of* an invidious purpose. And if the particular choice of lines on the map (or dates on the calendar) as a whole is "so bizarre on its face that it is unexplainable on grounds other than race [or gender]," *id.* at 644 (quotation omitted), then that purpose might fairly be presumed. But respondents have never even alleged that MHSAA's tournament schedules violate that standard.

What respondents insist on calling "disparate treatment" by gender is merely a differential *impact* by gender that is inevitable in segregated programs. When teams (or schools, or prisons, or bathrooms) are segregated by gender, then the impact of any decisions implementing the details of those programs will be highly (and perhaps perfectly) correlated with gender. There is simply no other way to do it. Since differences are inevitable, and it is always possible to argue that a difference is better for one side or the other, scheduling decisions will inevitably produce arguable "disadvantages" that are highly correlated with the makeup of the teams—and therefore with gender.

But—and this is the critical point that merits this Court's review—any perceived "disadvantage" associated with a particular scheduling decision is not automatically *because of* (as opposed to *in spite of*) the gender composition of a team. Respondents allege that "MHSAA's scheduling decisions are made entirely on the basis of sex." Opp. 14. But that is not self-evident; it is their burden to prove. MHSAA might well have chosen the post-season tournament schedules it did for non-invidious reasons—such as, first and foremost, to coincide with the season most schools were already conducting their regular season contests. If respondents believe that MHSAA scheduled its girls' volleyball tournaments in winter *because they are composed of girls*, then they have the burden of proving that contention. *See Feeney*, 442 U.S. at 279.

Perhaps the clearest way to illustrate respondents' error is this: if MHSAA had chosen its respective boys' and girls' athletic tournament dates by random lottery, and a plaintiff alleged that the girls' season was "disadvantageous" relative to the boys' season (or vice-versa), respondents (and the Sixth Circuit) would treat the scheduling as a presumptively unconstitutional facial gender classification, and shift the burden to MHSAA to come up with an "exceedingly persuasive justification." Perhaps losing a fair lottery would be an "exceedingly persuasive justification" for what respondents' insist on calling "disparate treatment by gender," or perhaps not. Regardless, that is the wrong way to think about this problem.

The district court and Sixth Circuit wrongly relieved plaintiffs of their burden to prove that any "disadvantage" associated with the challenged scheduling decisions was the product of intentional discrimination, or that the athletic programs for boys and girls were not substantially equal. Respondents forthrightly concede that they "were not required to show any intent to harm female athletes, discriminatory animus, malice or any other evidence of motive, whether benevolent or invidious." Opp. 14-15. The

Sixth Circuit instead treated *any* difference in the implementation of separate teams as presumptively unconstitutional, regardless of the reason for the difference or the impact of that difference on the overall program.

MHSAA is not suggesting that respondents could never succeed on their claims. A "disadvantage" to female athletes produced by particular scheduling decisions could violate the Equal Protection Clause if it resulted from intentional discrimination (i.e., if the schedule was chosen *because of*, not merely *in spite of*, its adverse effect on girls), or if it resulted in athletic programs that were not substantially equal overall. But a difference, standing alone, is not sufficient. The Sixth Circuit's decision guts the burden of proof for plaintiffs challenging gender discrimination in the implementation of separate programs.

2. The Sixth Circuit's holding turns every trivial detail of how men's and women's programs are implemented into a constitutional case, and will have practical consequences that are simply unacceptable. As explained in greater depth by *amici*, administering separate athletic programs requires numerous decisions every day that create "disadvantages" for one team or another, but for which there simply can be no "exceedingly persuasive" justification.

For example, the Basketball Coaches Association of Michigan notes that a rural school with only one experienced coach has two choices: it can schedule boys' and girls' teams to play at the same time, thereby ensuring that one team will not have a qualified coach, or it can schedule teams to play in different seasons so that they can both share the coach. Under respondent's theory, *both* choices are presumptively unconstitutional, because either alternating seasons or assigning the experienced coach to one team implies a "facial classification" by gender. That cannot be the law. While decisions like these *might* be unconstitutional (if, for example, the school gave the boys the experienced coach *because they are boys*), subjecting them to intermediate scrutiny is absurd.

Respondents try to downplay the radical nature of the Sixth Circuit's holding by suggesting (Opp. 17) that differences are not necessarily *disadvantages*. That distinction is entirely in the eye of the beholder. Any difference will have consequences that a particular plaintiff might find disadvantageous. For example, scheduling practice times in a shared gymnasium, or assigning referees to officiate games will inevitably lead to minor differences that someone will deem disadvantageous. *See* Br. of Mich. Ass'n of School Boards at 5-6. But there will never be an "exceedingly persuasive" justification for assigning a referee to any particular game. This litigation has focused on alleged "disadvantages" as subjective as the weather—is it better to start in warm weather and end in cold, or vice-versa—and came to opposite conclusions for golf and tennis. The district court concluded it was "advantageous" to play golf on less crowded courses even if there are not enough daylight hours to play 18 holes—as opposed to playing full rounds on more crowded courses. Perhaps a lawsuit complaining that the girls' bathroom was placed to the left of the fountain instead of the right is far-fetched; but the fact that such a claim would state a constitutional case sufficient to shift the burden of proof should suffice to show that the Sixth Circuit's analysis is flawed.

Because "the parade of potential discrepancies between the various male and female programs is endless," the scope of litigation is endless as well. Br. of Mich. Interscholastic Athletic Adm'rs Ass'n at 8. If schools are required to supply an "exceedingly persuasive justification" for every individual difference, then every decision will have constitutional ramifications. The ensuing litigation, or even the threat of litigation, will for all practical purposes make separate facilities unconstitutional.

3. Respondents did not allege, and the Sixth Circuit did not hold, that the overall athletic opportunities were not substantially equal for boys and girls. Respondents concede that the appropriate inquiry is into the *overall* athletic

programs. Opp. 16 n.9 (quoting *Haffer v. Temple Univ.*, 678 F. Supp. 517, 525 (E.D. Pa. 1987) ("This court's task is to . . . determine whether defendants offer equivalent athletic programs to men and women.")). The district court's finding that girls received "all of the disadvantageous playing seasons" among the six sports respondents chose to focus on, Pet. App. 98a, is not equivalent to a finding that the overall athletic offerings were not substantially comparable.

Respondents misunderstand this Court's holding in *United States v. Virginia*, 518 U.S. 515 (1996). It held that separate military institutions for men and women were unconstitutional because the state did not demonstrate "substantial equality" in the "educational opportunities" for men and women. *Id.* at 554. This Court determined that VWIL's *program as a whole* was a "pale shadow" of VMI's after examining such wide-ranging educational considerations as "the student body, faculty, course offerings, and facilities" as well as "funding, prestige, alumni support, and influence." *Id.* at 552-53. This Court *did not* hold that every detail had to be identical or independently supported by an "exceedingly persuasive justification."

Respondents have never made any effort to articulate a meaningful conception of what "substantial equality" means for the overall athletic programs. As MHSAA and various *amici* have emphasized, interscholastic athletic programs are designed "to enhance the educational experiences" for *all* high school athletes, and to "promote participation and sportsmanship . . . and to maximize the achievement of educational goals." Brief of *amicus curiae* Nat'l Fed'n of State High School Ass'ns at 2. Respondents flatly assert that the seasons selected for girls are "manifestly unequal" to those of boys. Opp. 16. But without analysis of how the alleged differences relate to the overall athletic programs, respondents are essentially arguing that VWIL could have been unconstitutional merely because its cafeteria served fish sticks on Fridays, if a court were convinced that fish sticks are "manifestly unequal" to the pizza served at VMI.

Respondents have presented no evidence that the disadvantages they have identified have any substantial impact on the overall athletic offerings. To the contrary, MHSAA reasonably maintains that its scheduling choices create tangibly *better* athletic opportunities for both girls and boys. And indeed, most of respondents' complaints have nothing whatsoever to do with the core educational goals of the interscholastic athletic programs. MHSAA has never considered Nike's schedule to be relevant to its attempts to maximize participation and the use of scarce facilities.

4. Respondents try unsuccessfully to distinguish away the conflict between the Sixth Circuit and the Third, Fourth, Eighth and D.C. Circuits. There is a square conflict.

The Sixth Circuit's decision conflicts with the Fourth Circuit's holding in *United States v. Virginia*, 44 F.3d 1229 (4th Cir. 1995), for the same reason (discussed above) that it is inconsistent with this Court's reasoning in that same case.

In *Vorchheimer v. School District*, 532 F.2d 880 (3d Cir. 1976), the Third Circuit upheld separate schools for boys and girls even though the system operated to the disadvantage of girls in some respects. Respondents suggest, superficially, that the Third Circuit held that the schools were "equal." Opp. 18. In fact it held that the "education available to the female students . . . is comparable" overall, although the science offerings at the boys' school were "superior." 532 F.2d at 882. The Third Circuit did not hold that that difference must independently satisfy intermediate scrutiny (which it did apply, *see id.* at 888).

Respondents attempt to distinguish the Eighth and D.C. Circuit prison cases, but they are directly on point. The plaintiffs in those cases argued that the education and employment offerings in women's prisons were different from the similar offerings at men's prisons, in ways that were disadvantageous to women. The Eighth and D.C. Circuits squarely held that, although there were disadvantages, the differences were not facial classifications and the plaintiffs must prove discriminatory intent. As the

Eighth Circuit put it, even though male and female inmates are segregated into separate prisons, "there is simply no . . . statute or policy that distinguishes on its face between men and women as to prison programs. . . Determining whether the plaintiffs receive inferior programs because of their sex . . . requires looking beyond the fact that female prisoners are segregated from men and examining the reasons behind the defendants' programming decisions." *Klinger v. Dept. of Corrections*, 31 F.3d 727, 734 (8th Cir. 1994).

II. TITLE IX PREEMPTS THE § 1983 CLAIM

1. Respondents concede that there is a direct, acknowledged circuit split over whether Title IX preempts § 1983 claims under the *Sea Clammers* doctrine. Respondents do not contest the importance of that conflict. Instead, they argue that this Court should not address the issue because it was not argued below.

Petitioner did not press the issue below because the Sixth Circuit had previously held that Title IX does not preclude claims brought under § 1983, and raising the issue would have been futile. Petitioner recognizes that the posture of the preclusion issue is unconventional. If this Court believes that posture makes review inadvisable, petitioner respectfully suggests that the Court grant review only of the equal protection issues. But this Court is not barred from considering the issue if it chooses to, and there are strong prudential reasons for granting review.

Although this Court normally does not consider issues not presented below, it has repeatedly held that it has that power. *E.g.*, *Youakim v. Miller*, 425 U.S. 231, 234 (1976). In *Carlson v. Green*, 446 U.S. 14, 17 n.2 (1980), this Court addressed an issue raised in the petition but not below, reasoning that "the interests of judicial administration will be served by addressing the issue on its merits."

The question of whether Title IX precludes § 1983 claims is an important issue that is dividing the lower courts. Congress's enactment of Title IX reflects its judgment that promoting gender equity in education is best achieved by

creating incentives for educational institutions to work with the Department of Education (DOE) to establish policies that will eliminate discrimination. Title IX's incentive system, its focus on educational institutions (not individual officers), its comprehensive administrative regime, and its enforceability by private plaintiffs make it clear that Congress intended Title IX to supersede equal protection claims brought pursuant to § 1983. *See Smith v. Robinson*, 468 U.S. 992, 1011-12 (1984) (comprehensive nature of Education of the Handicapped Act and carefully tailored administrative regime demonstrate Congress' intent to bar equal protection claims brought under § 1983).

The *Sea Clammers* issue is squarely presented here because the Sixth Circuit relied solely on the § 1983 claim to support its judgment. If this Court grants review, the issue will be the subject of full briefing, and it has already been thoroughly addressed in seven court of appeals opinions. Furthermore, this is a pure question of law for which no augmentation of the record is necessary. In sum, any prudential reasons against addressing the issue are minimal.

2. Respondents note that MHSAA argued in the district court that it was not subject to Title IX. Petitioner did have an argument that Title IX does not apply to it, but that argument was soundly rejected by the district court. If this Court grants review of the *Sea Clammers* issue, petitioner waives any argument that Title IX does not apply to it for purposes of this case. Therefore, there is nothing interfering with this Court's consideration of the issue.

The fact that respondents might ultimately win under Title IX also is not a vehicle problem. If petitioner prevails on the *Sea Clammers* issue, this Court would remand for consideration of the Title IX claim on the merits.[1]

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[1] Respondents' reliance on the state law claim as an alternate ground for affirmance, Opp. 8, does not obviate the need for review. The state law claim is not an independent ground for decision because Michigan's civil rights law is coextensive with the Equal Protection Clause. Pet. App. 110a-116a. If this Court concludes that Title IX precludes § 1983

Petitioner has strong arguments under Title IX that the court of appeals did not address because it wrongly believed it could resolve the case on Equal Protection grounds.

The DOE has made it quite clear it does not believe that Title IX commands precisely identical treatment in order to establish meaningful equality. For example, in its most recent "Additional Clarification of Intercollegiate Athletics Policy," DOE's Office of Civil Rights increased the flexibility for colleges to satisfy Title IX even without providing identical athletic opportunities for students. *Available at*: http://www.ed.gov/about/offices/list/ocr/docs/title9guidanceadditional.html. DOE has also proposed a rule permitting single-sex classrooms that would require "substantially equal," but not precisely identical, offerings. *See* Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 69 Fed. Reg. 11,276 (proposed Mar. 9, 2004) (to be codified at 36 C.F.R. pt. 106). It states that "a single-sex class for each sex, in the same subject, generally is not required," and indeed that "different results for boys and girls, in some instances, may be permissible." *Id.* at 11,279.

The district court's Title IX analysis was deeply flawed, giving short shrift to both the text of the statute and its implementing regulations. Both the statute and the regulations look to substantial equality in the overall athletic opportunities for boys and girls, a consideration that the district court simply did not address.

CONCLUSION

The petition for certiorari should be granted.

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claims, it could still provide guidance on the Equal Protection issue in the course of reversing the district court's interpretation of the (federally dependent) state law. The state claim is fairly included in the question presented. Even if this Court chooses not to reach that claim, the fact that respondents might ultimately prevail on either the state law claim or Title IX on remand does not make the *Sea Clammers* issue less important or squarely presented.

Respectfully submitted,

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